PUBLIC PROSECUTOR

v.

MISBAH SAAT

HIGH COURT MALAYA, MUAR
VISU SINNADURAI J
[PJ NO: 43-22-1994]
18 JUNE 1997

CRIMINAL PROCEDURE: *Plea of guilty - Accused insane during commission of offence but fit to stand trial - Whether accused may plead guilty - Criminal Procedure Code, ss. 347 & 348 - Penal Code, s. 84 - Test for insanity - Fitness to plead*

CRIMINAL PROCEDURE: *Trial - Defence of insanity - Fitness to plead - When must judge consider insanity - Whether court bound to consider insanity when issue not raised by defence - Whether accused can plead guilty*

CRIMINAL PROCEDURE: *Trial - Insanity - Whether trial judge can raise issue - Unfitness to plead raised by prosecution - Burden and standard of proof*

This was a hearing of the prosecution's application for revision to set aside the judgment of the Sessions Court judge who had, on the accused pleading guilty, sentenced him to a term of seven years' imprisonment. The accused was charged for causing mischief by fire with intent to destroy a house, an offence under s. 436 of the Penal Code ('Code'). As a result, the house was completely burnt down and his grandmother who was in the house at the material time was found dead. The accused was sent to a hospital for observation and the medical report stated that the accused was suffering from a mental disorder, such that at the time of the offence, the accused was aware of what he was doing but did not realise that it was wrong. The accused was treated for the disorder and the medical report after completion of treatment stated that the accused was in a stable condition and was fit to plead. At the trial, the accused pleaded guilty and was convicted and sentenced to seven years' imprisonment. The prosecution applied for revision, arguing that the plea of guilty should not have been accepted by the court, as the accused was of unsound mind at the time of the commission of the offence. The question of unsound mind was not raised in court by the prosecution, but it was submitted that as the court had accepted the medical report, the court had cognisance of the fact of the unsound mind of the accused. The issues that had to be determined were: (i) whether an accused who was possibly insane at the time of the offence, but is fit to stand trial, is precluded from exercising his right

under the Criminal Procedure Code ('CPC') to plead guilty; (ii) whether the defence of insanity must be raised before the court can consider the issue of insanity; (iii) whether the prosecution or the court can raise the issue of insanity; (iv) whether an accused can raise the defence of insanity and when can it be raised.

Held:

[1] There are two fundamental principles underlying the law on unsoundness of mind. The first is that a person ought not to be convicted if at the time of the alleged wrongdoing, he did not know what he was doing. The second is that during the trial, that person must understand the charge and the consequences that follow from it.

[2] It is a cardinal principle of law that no man can be tried for a crime unless he is in the mental condition to defend himself. In determining the issue of fitness of the accused, the court should not only rely on the evidence of the medical officer but should apply a reasonable and commonsense test. The court must be satisfied that the accused is able to plead to the charge, that he can understand the nature of the proceeding, that he is able to follow the course of the proceeding, that he is able to make his defence, and that he is able to decide what defence he will rely on.

[3] It is an established principle of law that if an accused person can establish that he was of unsound mind at the time of the commission of the act of wrongdoing, he is entitled to raise the defence of insanity under s. 84 of the Code. The test for insanity under s. 84 of the Code is not the medical test of insanity but the legal test, that is, the wrongdoer was incapable of knowing the nature of the act, or knowing that what he was doing was wrong or contrary to law. The burden is on the accused to prove his insanity as required by s. 84 of the Code.

[3a] Once the defence of insanity is successfully raised, the court records an acquittal under s. 347 of the CPC, and by virtue of s. 348 of the CPC the High Court must order the person to be sent to a mental hospital, and for the Magistrates' Court, the magistrate may either send him to a mental hospital or caution and discharge the person. The magistrate can only discharge the person if the offence for which the person was charged is not of a serious nature.

[4] A trial judge needs to consider the issue of insanity either when it is raised as a defence or to determine whether the accused is fit to stand trial. If the accused does not raise the issue of insanity as a defence

the court is not duty-bound to determine this issue by conducting a full inquiry as to whether the accused was legally insane at the time of the commission of the offence. A duty is only imposed on the court to determine whether at the trial, the accused is fit to stand trial. Once it is established that the accused is fit to stand trial, on a charge being read to him, the accused has an option to plead guilty to the charge or not. Although the defence of insanity may be available to the accused, yet he may, in the exercise of his right, choose not to raise the defence.

[5] An accused person who has recovered from his unsoundness of mind, and who is fit to stand trial, may choose not to raise the defence of insanity. Where the accused is no longer suffering from any mental impediments, he may choose to accept responsibility for his act. Whatever the reason, so long as he is fit to stand trial, his right to take whatever course of action prescribed by the law, remains intact.

[5a] It is a well established principle that only the accused has the right to raise the defence of insanity if he so wishes. Neither the prosecution nor the the judge can raise the issue of insanity during a trial, if the accused has not himself raised this defence.

[6] There is no express provision in the Code or in the CPC which states that a person who was of unsound mind at the time of the commission of the offence but who has subsequently recovered and has been certified fit to stand trial, cannot plead guilty to the charge. Section 347 of the CPC is only applicable in cases where the accused has raised the defence of insanity under s. 84 of the Code and the court has been satisfied that he has successfully discharged the burden placed upon him. No obligation is imposed on the court to conduct a full trial whenever the court is aware of the previous mental condition of the accused.

Obiter dicta

[1] It is only in exceptional circumstances that a judge conducting a trial may on his own volition raise the issue of insanity. A judge in such exceptional and rare circumstances must first be satisfied that there is relevant evidence which goes to all the factors involved in the test of legal insanity.

[2] Where the prosecution evidence against the accused on the charge is weak such that there is a reasonable prospect of it being successfully challenged, the issue of whether the accused is capable of making his defence ought to be postponed to a time before the defence begins its case. The reason is that an accused person must not be deprived of the chance of being acquitted.

[3] If the question of unfitness to be tried is raised at the instance of the prosecution, the burden is on the prosecution to prove this fact to the satisfaction of the court. If the prosecution does not tender any medical evidence to establish this fact, then the prosecution must prove beyond a reasonable doubt that the accused is unfit.

[Prosecution's application dismissed.]

Cases referred to:
Chia Chan Bah v. The King [1938] MLJ 147 ***(cit)***
Kesavarajah v. The Queen [1994] 181 CLR 232 ***(refd)***
Maxwell v. R [1996] 135 ALR 1 ***(refd)***
Pendakwa Raya v. Zainal Abidin Mohd Zaid [1993] 1 CLJ 147 ***(foll)***
Public Prosecutor v. Alang Mat Nasir [1938] MLJ Rep 153 ***(cit)***
Public Prosecutor v. Chiah Eh Boon (1989 unreported) ***(dist)***
Public Prosecutor v. Nageswari Nagaratnam [1994] 4 CLJ 419 ***(not foll)***
R v. Beynon [1957] 2 All ER 513 ***(refd)***
R v. Dashwood [1943] 1 KB 1 ***(refd)***
R v. Dickie [1984] 3 All ER 173 ***(refd)***
R v. Presser [1958] VR 45 ***(refd)***
R v. Robertson [1968] 3 All ER 557 ***(cit)***
R v. Smith [1979] 3 All ER 605 ***(refd)***
R v. Starecki [1960] VR 141 ***(cit)***

Legislaation referred to:
Criminal Procedure Code, ss. 5, 294, 342(1), (2), (3), (5), 343(1), 347, 348(1), 351
Firearms Act 1960, s. 39
Penal Code, ss. 84, 304

Other sources referred to:
Blackstone's Criminal Practice, 1991, para A3.12
Fitness to Plead in Criminal Proceedings, Stanley Yeo, [1984] 2 MLJ lxxxiv
Fitness To Plead in Singapore and Malaysia, Prof Molly Cheang, 1988 Anglo-American Law Review, p 209
The Penal Code of Singapore and States of Malaya, Koh & Myint Soe, 1974, vol 1, Chapter VI
The Plea of Insanity: Some Observations on the Application of the "Wrong or Contrary to Law" Test in Singapore, Malaysia and India, Dr JK Canagarayar, [1995] 2 MLJ iii

For the applicant - Rosli Kamaruddin, Amelia Tee Hong Geok; Haslinda Abu Bakar DPPs
Respondent in person

JUDGMENT

Visu Sinnadurai J:

At the conclusion of the hearing of this application for revision, this court dismissed the application. I now give my reasons for so dismissing the application.

This is an unusual application for revision. In this application the prosecution is seeking to set aside the judgment of the Sessions Court judge, Muar, who had, on the accused pleading guilty to the charge, sentenced the accused to a term of imprisonment for seven (7) years. The effect of this application for revision, if allowed, is to have the case remitted back to the Sessions Court for the Sessions Court judge to set aside the plea of guilty pleaded by the accused, and instead conduct a full trial so as to determine whether the accused was insane at the time of the commission of the offence, such that if the accused is found to be so, to send him to a mental hospital for an indefinite period of time.

This application therefore raises a fundamental issue relating to the rights of an accused person: whether, an accused, when there is some evidence before the court to suggest that he was insane at the time of the commission of the offence, but who is fit to stand trial, is precluded from exercising his right under the Criminal Procedure Code to plead guilty to the offence for which he is charged.

There is a paucity of Malaysian authorities on this important aspect of criminal procedure, and therefore it is necessary for me to consider the position of such an accused person by making a detailed study of the relevant statutory provisions and the available caselaw.

I am given to understand that the practice of the courts has been that, if at the commencement of a trial, there is evidence of the accused person being of unsound mind at the time of the commission of the offence, the courts would refuse to accept the plea of guilty, even if at the time of the trial the accused had recovered from the mental illness and had been confirmed by a medical officer to be fit to stand trial. In such cases, the magistrate or the Sessions Court judge conducting the trial, often rejects the plea and proceeds to conduct the trial to determine the issue whether the accused was insane at the time of the commission of the offence.

The Facts

The appellant aged 27 in the present case was charged in the Sessions Court for an offence under s. 436 of the Penal Code. The said charge read as follows:

> Bahawa kamu pada 7.1.1994 lebih kurang jam 8.45 malam di Kg Sg Gersik, Sg Balang Parit Jawa, di dalam Daerah Muar, di dalam Negeri Johor, telah melakukan khianat dengan api dengan niat menyebabkan kerosakan kepada bangunan kepunyaan Esah bte Karton KP No 2244434 yang digunakan sebagai tempat kediaman manusia atau menyimpan harta benda. Oleh itu kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 436 Kanun Kesiksaan.

The said offence, that is causing mischief by fire with intent to destroy a house, is punishable under the Penal Code for a term of imprisonment up to 20 years, and also a fine.

The accused lived with his mother, aged 60 years, and his grandmother, aged 80 in an unnumbered wooden house in Parit Jawa, Muar. The accused set fire to the house and as a result, the house was completely burnt, and his grandmother who was in the house at the material time was subsequently found dead. A post-mortem report indicated that her death was caused by the fire. From the facts, it also appears that when the mother attempted to put out the fire, the accused had prevented her from so doing.

The accused was subsequently sent to the Hospital Permai Tampoi for observation. A medical report dated 3 September 1994, that is about nine months after the incident, on the accused stated that the accused was under observation and that:

> During his stay here, patient showed signs and symptoms of a serious mental disorder called "Manic Depressive Psychosis" which is characterized by illogical thinking, grandiose delusion and disinhibited behaviour.
>
> At the time of the offence, patient was aware of what he is doing but did not realize that it was wrong.
>
> Patient has been started on treatment and at present, his mental state is stable and he is fit to plead.

It will be observed that the same medical report clearly states that after treatment, the accused was in a "stable state and he is **fit to plead**" (emphasis added).

On 7 December 1994, the accused was brought before the Sessions Court Muar to stand trial. The accused pleaded guilty and the plea was accepted by the Sessions Court judge who then convicted the accused and sentenced him to seven (7) years imprisonment with effect from the date of arrest.

The Deputy Public Prosecutor, dissatisfied with the decision arrived at by the learned Sessions Court judge, then applied to this court for a revision of the decision of the Sessions Court. The main argument advanced by the learned Deputy Public Prosecutor was that following the decision of Abdul Malik JC (as he then was) in *Public Prosecutor v. Nageswari Nagaratnam* [1994] 4 CLJ 419, the learned Sessions Court had erred in law in accepting the plea of guilty by the accused on the ground that at the time of the commission of the offence, the accused was of unsound mind. I shall revert to this decision in the latter part of my judgment.

Though the question of unsoundness of mind did not arise before the Sessions Court judge, the Deputy Public Prosecutor argues that by the fact that the Sessions Court judge accepted the medical report of the medical officer in Hospital Permai, Tampoi, the court had cognisance of the fact that the accused was of unsound mind at the time of the commission of the offence. Such being the case, it was argued, the accused could not plead guilty nor could the Sessions Court judge accept the plea.

I must emphasise that reading the notes of evidence there is nothing to indicate that the question of unsoundness of mind at the time of the commission of the offence was raised before the Sessions Court. It appears to me that the learned Sessions Court judge relied on the said medical report only for the purpose of determining the issue as to whether the accused was fit to stand trial. The learned Sessions Court judge being satisfied from the medical report that the accused was fit to stand trial, accepted the plea of guilty by the accused and accordingly convicted him.

To determine, therefore, the correctness of the decision of the Sessions Court judge, it is now necessary for me to consider the law, and also the other case law on this point, particularly the decision of Abdul Malik JC in *Nageswari's* case, the case relied upon heavily by the deputy public prosecutor in seeking this revision.

The Law

Unsoundness of mind is relevant in criminal proceedings under two main circumstances: (a) whether the accused was of unsound mind when he committed the offence; and (b) whether he is fit to stand trial.

The fundamental principles underlying these aspects of the law should be emphasised: (a) a person ought not to be convicted if at the time of the alleged wrongdoing he did not know what he was doing; and (b) during a trial an accused person must understand the charge and the consequences that follow from it. An accused person must also be in a position to understand and follow the trial.

(a) Fitness To Plead

The terms "fitness to plead"; "fitness to stand trial"; "fitness to be tried" and "fitness to make defence" in the context of a person of unsound mind to stand trial are generally used to mean the same. As the High Court of Australia in *Kesavarajah v. The Queen* [1994] 181 CLR 232, pointed out at p. 234:

> The use of the terms interchangeably, while not accurate, is not uncommon: see, for instance, the discussion in Archibold, Pleading, Evidence and Practice in Criminal Cases (1993 edition), para. 4 - 158 under the heading "Defendant unfit to plead or take his trial".

Professor Molly Cheang in a comprehensive article published in [1988] Anglo-American Law Review, entitled *"Fitness To Plead in Singapore and Malaysia"* points out the rationale of this general principle of fitness to plead as follows, at p. 209:

> The idea that persons of unsound mind should not be made to stand trial is one rooted in the age-old concept of fair play and fundamental justice. This "fitness" principle is both the product of the basic fundamental right of an accused to defend himself and a logical extension of the common law rule which prohibits trials in absentia. An accused suffering from mental dis-ability is obviously unable to take the stress of a court appearance. It is also better for the dignity of the legal process that he should not be compelled to stand trial whilst labouring under such a condition. Indeed, if the accused is unable to comprehend the proceedings and to contribute to his own defence, it would be unjust to convict him because if he were capable of following the trial he might be able to exculpate himself. Moreover, mental disability may substantially diminish an accused's capacity to testify, to recall exonerating circumstances or identify witnesses and so forth.

In the early English case of *R v. Dashwood* [1943] 1 KB 1, it was observed at p. 4:

> It is a cardinal principle of our law that no man can be tried for a crime unless he is in a mental condition to defend himself.

The Criminal Procedure Code gives statutory recognition to this principle of law by providing the procedure for the courts to adopt when an accused person on trial is suspected of being of unsound mind. Section 342(1) provides:

> Where a judge or a magistrate holding a trial has reason to suspect that the accused person is of unsound mind and consequently incapable of making his defence, he shall in the first instance investigate the fact of such unsoundness.

Therefore, there is a clear duty imposed on the court to ensure that a person standing trial is fit to do so.

The court's attention as to the mental condition of the accused for purposes of determining whether he is fit to stand trial, may be drawn by the accused himself, the prosecutor or the medical officer. In *R v. Dashwood*, above, it was said at p. 4:

> It does not matter whether the information comes to the court from the defendant himself or his advisers or the prosecution or an independent person, such as, for instance, the medical officer of the prison where the defendant has been confined.

Similarly in *R v. Beynon* [1957] 2 All ER 513, at p. 515 it was pointed out:

> If the court is aware of the fact that there is a preliminary issue whether the person who is charged before the court on an indictment is insane so that he is unfit to be tried, it is the duty of the court to see that the issue is tried, even though no application is made by the prosecution or by the defence.

It should perhaps also be pointed out that there is another provision under the Criminal Procedure Code to enable the public prosecutor, even **before** the trial to send an accused person whom he suspects to be of unsound mind to a mental hospital for observation: s. 342(5).

For purposes of investigation conducted by the judge, as to whether the accused person is capable of making his defence, that is, whether he is fit to stand trial, the judge may receive as evidence a certificate in writing signed by a Medical Officer to the effect that such accused person is in his opinion of unsound mind or is a proper person to be detained for observation in a mental hospital, or such judge or magistrate may, if he sees fit, take oral evidence from a Medical Officer on the state of mind of such accused person: s. 342 (2).

It is, however, submitted that the courts in determining the issue of fitness should not merely rely on the evidence of the medical officer, but should also apply "a reasonable and commonsense" test, as propounded by Smith J in *R v. Presse*r [1958] VR 45, and as approved by the High Court of Australia in *Kesevarajah's* case, to determine the fitness of the accused (at p. 245):

> ... whether the accused person, because of mental defect, fails to come up to certain minimum standards which he needs to equal before he can be tried without unfairness or injustice to him.

In determining this issue, Smith J pointed out that the court ought to be satisfied of the following (at p. 48):

> He [the accused] needs, I think, to be able to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge.
>
> He needs to understand generally the nature of the proceeding, namely, that it is an inquiry as to whether he did what he is charged with.
>
> He needs to be able to follow the course of the proceedings so as to understand what is going on in court in a general sense though he need not, of course, understand the purpose of all the various court formalities.
>
> He needs to be able to understand, I think, the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. Where he has counsel he needs to be able to do this through his counsel by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is.
>
> He need not, of course, be conversant with court procedure and he need not have the mental capacity to make an able defence; but he must, I think, have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any.

If the court is so satisfied that the person is fit for trial, the trial should then proceed.

However, if after investigation, the judge is not satisfied that such person is capable of making his defence, the judge or magistrate must postpone the trial and shall, in accordance with the Criminal Procedure Code, remand such person for a period not exceeding one month to be detained for observation in any mental hospital: s. 342(3). The Criminal Procedure Code further provides that, where after an accused person has been sent to a mental hospital for observation to determine whether he is capable of making his defence, and the medical report subsequently indicates that the accused person 'is (still) of unsound mind and incapable of making his defence', the court is only empowered to further postpone the case after the court is satisfied of that fact. Section 343(2) provides:

> (2) If the Medical Superintendent shall certify that such person is of unsound mind and incapable of making his defence the court shall, if satisfied of the fact, find accordingly, and thereupon the trial shall be postponed.

Section 343(1) of the Criminal Procedure Code provides that such accused person may only stand trial when the medical superintendent of the mental hospital subsequently certifies that the accused person has recovered and that he is of sound mind and 'capable of making his defence'.

It should be observed that though s. 342(1) of the Criminal Procedure Code, appears to cover a situation where the question of the accused's unsoundness of mind arises when the trial **has already commenced,** the inquiry by the court as to the fitness of the accused person ought to be determined forthwith when it comes to the knowledge of the court, and ought not to be postponed until after the close of the prosecution case. It is the duty of the court either at the commencement of the trial, or at any stage during the course of the trial, when the question of fitness to stand trial is raised, to determine that issue immediately.

In the recent Australian case of *Kesavarajah v. The Queen,* above, the High Court of Australia considered the issue whether the question of unfitness may be raised at a late stage of the trial. The High Court held that the accused person's fitness to be tried was not to be determined solely by reference to his condition immediately before the commencement of the trial, but also having regard to what his condition would or was likely to be during the course of the trial. The High Court observed, at p. 246:

> It makes no sense to determine the question of fitness to be tried by reference to the accused's condition immediately prior to the commencement of the trial without having regard to what the accused's condition will or is likely to be during the course of the trial. There is simply no point in embarking on a lengthy trial with all the expense and inconvenience to jurors that it may entail if it is to be interrupted by reason of some manifestation or exacerbation of a debilitating condition which can affect an accused's fitness to be tried. Of course, that is not to exclude from the jury's consideration the question whether the condition is such that difficulties can be accommodated by an adjournment if and when they arise.

I must also point out that there are certain other related issues which are not expressly provided for in the Criminal Procedure Code, and as such, the position in Malaysia pertaining to these issues remain unclear. For example, the English and Australian courts in dealing with the issue of fitness to plead, have adopted the following principles:

(a) Where the prosecution evidence against the accused on the charge is weak such that there is a reasonable prospect of it being successfully challenged, the issue of whether the accused is capable of making his defence ought to be postponed to a time before the defence begins its case. The reason for this is that an accused person must not be deprived of the chance of being acquitted: see *R v. Burles,* above.

(b) If the question of unfitness to be tried is raised at the instance of the prosecution, the burden is on the prosecution to prove this fact to the satisfaction of the court. If the prosecution does not tender any medical evidence to establish this fact, then the prosecution must prove beyond reasonable doubt, as in the case of any ordinary criminal trial, that the accused is unfit: see *R v. Robertson* [1968] 3 All ER 557.

Whether such similar approaches would be adopted by the Malaysian courts remains to be determined in a future case where such issues may arise for consideration. Though not relevant for the purposes of the present application, I am, however, of the view that some of these principles ought to be adopted in Malaysia. Stanley Yeo, senior lecturer at the Faculty of Law, National University of Singapore, in an article entitled *"Fitness to Plead in Criminal Proceedings"*, [1984] 2 MLJ lxxxiv, is of the view that some of these English principles may be applicable in Malaysia by virtue of s. 5 of the Criminal Procedure Code: see note 10. The learned writer further states:

> The (Criminal Procedure) Code does not define the phrase 'unsoundness of mind' nor does it state the factors which are relevant in determining whether an accused is incapable of making his defence ... The factors to be considered in assessing the accused's mental condition at the time of the inquiry or trial are those which have evolved under English common law. These factors are whether the accused has sufficient intellect (i) to understand the nature of the charge and the possible consequences of a finding of guilt; (ii) to instruct his legal counsel; (iii) to understand the substance of the evidence against him; and (iv) to understand the course of the proceedings at the trial so as to make a proper defence. A fifth factor of having sufficient intellect to challenge jurors is relevant in Malaysia where jury trials continue to be held (now no longer applicable).

(b) Unsoundness Of Mind At The Time Of Commission Of The Act

It is an established principle of law that if an accused person can establish that he was of unsound mind/insane at the time of the commission of the act of wrongdoing, he is entitled to raise the defence of insanity under s. 84 of the Penal Code. Section 84 provides as follows:

> Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

It must be stressed that the test for insanity under s. 84 is not the medical test of insanity but the legal test, that is, the insanity must be such as to fall within the ambit of s. 84. As Shankar J said in *Pendakwa Raya v. Zainal Abidin Bin Mohd Zaid* [1993] 1 CLJ 147 at p. 149:

> The issue as to whether an accused person was insane in the sense required by s. 84 of the Penal Code is a matter for the court. Legal insanity is not for the medical witnesses to decide however eminent they may be.
>
> That onus is upon the defence and it is to satisfy the court on the balance of probabilities only. It can be discharged from evidence adduced from the prosecution or from defence witnesses. It is a lighter burden than that cast upon the prosecution who must prove the charge beyond reasonable doubt.

It has long been established that the burden is on the accused to prove his insanity as required by s. 84. The mere tendering of a medical certificate from a mental hospital as in the case where the question arises as to whether the accused is fit to stand trial, is not sufficient. Though there is no express provision in the Criminal Procedure Code to provide for the manner in which unsoundness of mind as a defence to an offence may be dealt with by the courts, such procedure, is now clearly established by case law. As to the question of burden of proof, see *Public Prosecutor v. Alang Mat Nasir* [1938] MLJ Rep 153 and *Chia Chan Bah v. The King* [1938] MLJ 147. See also generally, Koh and Myint Soe, The Penal Code of Singapore and States of Malaya, Vol. 1, 1974, Chapter VI. What the Criminal Procedure Code, however, provides for is the steps to be taken by the court when the defence of insanity has successfully been pleaded, and as a consequence the accused is acquitted. Section 347 provides:

> Whenever any person is acquitted upon the ground that at the time at which he is alleged to have committed an offence he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence or that it was wrong or contrary to law, the finding shall state specifically whether he committed the act or not.

Section 348 further provides as follows:

> (1) Whenever the finding states that the accused person committed the act alleged, the court before whom the trial has been held shall, if such act would, but for incapacity found, have constituted an offence, order such person to be kept in safe custody in such place and manner as the court thinks fit and shall report the case for the orders of the Ruler of the State in which the trial is held: provided that if the court concerned is a Magistrate's court, the magistrate may in his discretion, if he considers that the offence charged is not of a serious nature and that such person can safely be released without danger of his doing injury to himself or any other person, caution and discharge him.
>
> (2) The Ruler may order such person to be confined in a mental hospital during the pleasure of the Ruler of the State.

Therefore, once the defence of insanity has been successfully raised, and the court accordingly records an acquittal under s. 347, by virtue of s. 348, the court, in the case of a High Court, must order that the person be sent to a mental hospital, and in the case of a Magistrates' court, the magistrate may either send him to a mental hospital or caution and discharge the person. The magistrate can only take the latter course if the offence for which the person was charged is "not of a serious nature".

Present Case

With the above observations, I now move on to consider the present application for revision.

As pointed out earlier, a trial judge needs to consider the issue of insanity either when it is raised as a defence or to determine whether the accused is fit to stand trial. If the accused does not raise the issue of insanity as a defence, the court is not duty-bound to determine this issue by conducting a full inquiry as to whether the accused was legally insane at the time of the commission of the offence. A duty is only imposed on the court to determine whether at the trial, the accused is fit to stand trial. Once the court is satisfied that he is fit to stand trial, the trial is conducted in the usual manner. Therefore once it is established that the accused is in a fit state to stand trial, on a charge being read to him, the accused, like any other person on trial, has an option to plead guilty to the charge or not. Though the defence of insanity may be available to the accused, yet he may, in exercise of his right, choose not to raise the defence. It must be remembered that if insanity as a defence is successfully raised, the accused, though securing an acquittal, is not set free, like any other person who has been acquitted. The accused, on acquittal will be sent to a mental hospital for an indefinite period of time.

What then is the position, like in the present case where at the time of commission of the offence the accused was of unsound mind (at least according to the medical report), but where, however, at the time of the trial itself, he is fit to stand trial. Such a situation is no longer uncommon especially in view of modern advances in science and medicine, particularly the treatment of persons with psychiatric-related problems. It is now medically possible for a person to recover from certain mental illnesses which he may have suffered at a particular point of time.

Strictly speaking, an accused person who has recovered from his unsoundness of mind, and who is fit to stand trial, may choose not to raise the defence of insanity. What must be stressed is that the accused person, so long as he is fit to stand trial, has, like any other accused person, also the right to raise the defence of insanity or not. As Geoffry Lane LJ (as he then was) observed in *R v. Smith* [1979] 3 All ER 605, at p. 608:

> Had the defence of diminished responsibility been run it would have been supported by those two doctors and would undoubtedly have succeeded. But, of course, **it is a defendant's option whether he runs that defence or not,** and the applicant chose not to ... (Emphasis added)

This observation of the right of the accused to avail himself of any of the defences, is equally applicable in Malaysia.

There are several reasons as to why an accused person, though medically insane at the time of the commission of the offence, and who is likely to succeed in raising the defence of insanity under s. 84 of the Penal Code, may opt not to avail himself of this defence. The major reason being that he may not wish to be castrated by society by being labelled as insane, or wish to be confined to a mental hospital for an indefinite period of time. He may also not wish to relive the trauma of the past by recounting the incident during the trial, especially so in cases where he had committed a grave offence against a family member. In some other cases, where the accused is no longer suffering from any mental impediments, he may simply choose to accept responsibility for his act. But whatever the reason, so long as he is fit to stand trial, his right to take whatever course of action prescribed by the law, remains intact.

The following passages from *Blackstone's Criminal Practice,* 1991, para. A3.12 is relevant in this context:

> ... the consequences of an **insanity verdict are so unattractive that seldom would an accused wish to seek one.** The 'special verdict' of 'not guilty by reason of insanity' ... is provided for in the Trial of Lunatics Act 1883. Section 2 ... Where a special verdict is returned the court shall make an order that the accused be admitted to such hospital as may be specified by the Secretary of State.
>
> ... Thus a 'successful' **plea of insanity will result in detention for an indefinite period of time in a mental hospital** (frequently one of the four 'special hospitals' such as Broadmoor), **a prospect usually much less attractive than conviction for the offence charged.** Even on a murder charge, the abolition of the death penalty in 1965 coupled with the introduction of the much more flexible defence of diminished responsibility in the Homicide Act 1957, s. 2, has removed any incentive to plead insanity. (Emphasis added)

In some cases, like in *R v. Smith,* above, the accused persons are so determined not to avail themselves of the defence of insanity, that they have even gone to the extent of challenging the admissibility of any medical report tendered by the psychiatrists, on the grounds, *inter alia,* that it is in breach of confidence between a patient and a doctor.

It should further be pointed out that the principle that only the accused has the right to raise the defence of insanity if he so wishes, is so well-recognised such that it has been held that neither the prosecution nor the judge could raise the issue of insanity during a trial, if the accused had not himself raised this defence. In *R v. Dickie* [1984] 3 All ER 173, the English Court of Appeal pointed out at p. 178:

> ... we can find no precedent on which we should be inclined to rely for assuming that the prosecution has such a right. The prosecution has a positive duty to prove if it can the allegation which it makes on the indictment. It has the power if the issue is raised by the defence to rebut by its own evidence the attempt by the defence to establish insanity. It has the obligation, if it has evidence in its possession of insanity which will assist the defence to establish that the defendant was in that condition when the crime was committed to make that evidence available to the defence in good time, so that in its discretion it may make proper use of it.

Their Lordships also considered the position under English law and concluded (at p. 8):

> In England it appears to have been thought at one time that a trial judge had a discretion to refuse to allow the acceptance by the prosecution, in satisfaction of the indictment, of a plea of guilty to a lesser offence than that charged. But that view is no longer held.

The Court of Appeal also observed that it was only in certain exceptional circumstances that a judge conducting a trial may on his own volition raise the issue of insanity. A judge, in such "exceptional and rare" circumstances, must first be "satisfied that there is relevant evidence which goes to all the factors involved in the *M'Naghten* test, that is legal insanity.

Malaysian Caselaw

At this juncture, it is necessary for me to consider the cases of *Public Prosecutor v. Nageswari Nagaratnam* [1994] 4 CLJ 419; *Pendakwa Raya v. Zainal Abidin bin Mohd Zaid* [1993] 1 CLJ 147; and *Public Prosecutor v. Chiah Eh Boon* [1989], Supreme Court, unreported, which were brought to the attention of this court. I shall first deal with the case of Nageswari, the case which was heavily relied upon by the prosecution in this application.

On a close reading of *Nageswari's* case it appears that the decision of Abdul Malik JC (as he then was) was based on the following facts: the accused had gone to a jewellery shop where she saw two bangles and upon holding the same, she left the shop without paying for them. She was subsequently charged for an offence of cheating under s. 420 of the Penal Code. On the date fixed for trial before the Magistrate's Court Taiping, the accused pleaded guilty to

the charge. The accused also admitted to the facts of the case as tendered by the prosecuting officer. On the facts as admitted by the accused, the magistrate convicted the accused.

Subsequently, the officer from the Legal Aid Bureau who made the plea in mitigation on behalf of the accused, sought clemency on the ground that the accused was insane at the time of the commission of the offence. Abdul Malik JC found that the magistrate must have been "swayed by the issue of insanity", and it was for this reason that the magistrate ordered the accused to be bound over in the sum of RM1,500 for a period of two years under s. 294 of the Criminal Procedure Code.

On an application by the Deputy Public Prosecutor for revision, it was argued before Abdul Malik JC that as the medical report showed that the accused had a relapse of schizophrenia at the time of the commission of the offence, and as the magistrate was aware of the mental background of the accused, the magistrate ought not to have accepted the plea of guilty by the accused, but instead conducted a full trial to determine the issue of insanity.

Abdul Malik JC in agreeing with the arguments of the Deputy Public Prosecutor observed:

> ... when the learned magistrate proceeded to accept the plea of guilty by the accused knowing fully well the adverse report from the said hospital, it was an exercise calculated to undermine the established principles in criminal law, namely, on a plea of guilty, the accused must be convicted and sentenced accordingly. **Since the learned magistrate took cognizance of the report from the said hospital, by virtue of s. 347 of the CPC, the judgment of the learned magistrate should be one of acquittal on the ground of mental disorder.** And further the learned magistrate must make a finding as to whether the accused committed the act or not. This was clearly not done by the learned magistrate. (Emphasis added)

The learned judge then went on to consider the relevant provisions of the Criminal Procedure Code, particularly s. 347 and concluded:

> I am of the considered view that the legislature in enacting s. 347 of the CPC must have intended that an order of **acquittal** on the ground of mental disorder should be made after a full-fledged trial. No short cut is allowed and any short cut like the present case where the accused pleaded guilty and the learned magistrate forthwith accepted the plea and after convicting the accused bound over the accused without adverting to s. 347 of the CPC must surely be wrong and such an error, omission or irregularity has occasioned a serious failure of justice. Section 422 of the CPC cannot be invoked to remedy the embarrassing situation. (Emphasis added)

The learned judge then in exercise of his revisionary powers, set aside the order of the magistrate and remitted the case back to the magistrate for the magistrate to proceed with the trial.

The judgment of Abdul Malik JC appears to suggest that the accused person had in fact raised the issue of insanity as a **defence**. However, the facts, as stated above, do not indicate so. On the contrary, the facts clearly indicate that the question of insanity was only raised after **conviction,** and, that too, was for purposes of mitigation. It is therefore not clear as to why Abdul Malik JC was of the view that the magistrate had to consider the question of insanity at the time of the commission of the alleged offence when the defence of insanity was not raised.

It may be that as the medical report which was tendered to the magistrate indicated that the accused was of unsound mind, the magistrate had to take cognisance of this fact. But the important factor to bear in mind is that, it is not for the court to consider the mental state of the accused at the time of the commission of the offence if the defence of insanity is not raised by the accused. The court's responsibility is only to ensure that the accused is fit to stand trial. For this purpose, the medical report is relevant to assist the court in this finding. Furthermore, as pointed out earlier, whether the accused wishes to raise insanity as a defence is the sole prerogative of the accused. Therefore, if the accused does not raise insanity as a defence, there is no necessity for the courts to determine whether he was insane at the time of the commission of the offence.

I am therefore of the view that in *Nageswari's* case, as the medical report clearly stated that the accused person was fit to stand trial, and as the defence of insanity was not raised by the accused, there was no need for the court to inquire into the issue as to whether the accused was insane in law at the time of the commission of the offence. In such cases, s. 347 of the Criminal Procedure Code is not applicable. Section 347 only applies if after the defence of insanity is raised by the accused, and the court finds that the accused was insane at the time of the commission of the offence. In such cases, the accused may then be acquitted on the grounds of insanity. The wordings of s. 347 bear close resemblance to the wordings employed in s. 84 of the Penal Code. Clearly, therefore, s. 347 was meant to apply only in cases when the defence of insanity had successfully been raised by the accused.

In taking the approach as he did, Abdul Malik JC in *Nageswari's* case also disapproved of the approach adopted by Shankar J in *Pendakwa Raya v. Zainal Abidin* [1993] 1 CLJ 147.

In *Zainal Abidin's* case, the accused was charged under s. 39 of the Firearms Act 1960. He was, before the trial, sent to a mental hospital for observation. Subsequently when on being produced in court, a medical report was issued wherein the doctors stated that though at the time of commission of the alleged offence the accused was of unsound mind, he was presently fit to plead in court.

At the hearing, the accused pleaded guilty to the charge and admitted to the facts alleged against him. The magistrate then made a specific finding under s. 347 of the Criminal Procedure Code that the accused had committed the act specified in the charge. Counsel acting for the accused subsequently, "as part of the defence", submitted the same medical report which was received in evidence. An application was made by counsel for the accused to be committed to the care of his bailor brother as provided for by ss. 348 and 351 of the Criminal Procedure Code. The magistrate then made an order that the accused be committed to the care of his bailor brother for safe custody pending the decision of the Ruler of the State and further order.

The deputy public prosecutor, being dissatisfied with the decision of the magistrate, applied for a revision on the grounds that (i) a plea of guilt could not be accepted from a person of unsound mind; (ii) the medical certificate did not comply with the requirements of s. 343 of the Code; and (iii) it was wrong to commit the accused to the care of his brother.

Shankar J after a brief discussion on the distinction between unsoundness of mind at the time of the offence and at the time of the trial, stated as follows, (at p. 149):

> In my view if the accused is of sufficiently sound mind to claim trial, he should likewise be able to admit the facts alleged against him, by the prosecution. It is then open for the defence to raise the defence of insanity and rely upon the medical testimony before the court. The magistrate in this case was the sole fact finder, and in the absence of any contest from the prosecution, I think he was quite entitled to proceed as he did.

His Lordship then concluded as follows:

> Consequently, I would treat the recording of the plea of guilt as a mere irregularity which did not occasion any failure of justice. Section 422 of the Code covers the situation and no further remedial action is required.

I now move on to consider the case of *Public Prosecutor v. Chiah Eh Boon* which was also relied upon by the deputy public prosecutor to support this application for revision. In that case, the accused had struck a nine-year old boy with a golok resulting in the death of the boy. The accused was then charged for committing culpable homicide not amounting to murder contrary to s. 304 of the Penal Code.

Police investigations revealed that at the time of the incident, the accused was suffering from mental illness and accordingly he was sent to Hospital Permai, Tampoi, Johor Bahru for treatment. The hospital authorities were of the opinion that the accused at the time of committing the alleged offence was suffering from schizophrenia and that by reason of unsoundness of mind, he was incapable of knowing the outcome of the act or that it was wrong or contrary to law.

At the trial, the accused pleaded guilty to the charge, and also admitted to the facts of the case as tendered by the prosecution. The High Court, then obviously in refusing to accept the accused's plea of guilty, proceeded, even without conducting a trial, to record a finding that it was satisfied that the accused had committed the act but by reason of unsoundness of mind he was incapable of knowing the nature of the act alleged as constituting the offence or that it was wrong or contrary to law. The court, accordingly ordered the accused to be detained at the pleasure of the Ruler under s. 348(1) of the Criminal Procedure Code. In taking this particular course, Idris J in his judgment (unreported) explained:

> 13. The court having heard the facts of the case as presented by the learned Deputy Public Prosecutor should have rejected the plea and fixed a date for trial. However, the court was informed that for some reasons the depositions taken at the preliminary enquiry were not available and most probably certain witnesses was no longer around, the investigating officer had passed away recently. Taking into account these factors and in particular the mental condition of the accused at the material time as conceded by the prosecution, the court proceeded to dispose of the case on the footing that he had succeed in availing himself of the defence of insanity under s. 34 of the Penal Code, **though the court fully appreciated that the procedure adopted was not proper.** (Emphasis added)

On appeal by the prosecution to the Supreme Court, the Supreme Court ordered (no written judgment was delivered by the Supreme Court), that the case be remitted back to the High Court for the judge to hold a trial, if the court was satisfied that the accused was fit to plead. In the circumstances of the case, especially in the light of the observation of the trial judge that a full trial ought to be conducted, to determine the issue of insanity, the Supreme Court was correct in remitting the case back to the trial judge to conduct the trial. The Supreme Court did not say that the reason for this was because the plea of guilty could not be accepted. In any event, as there was no written judgment delivered by the Supreme Court, the reasons for remitting back the case for trial remains unclear. Therefore, the decision of the Supreme Court in this case sheds little light on this aspect of the law.

Conclusion

I am unable to accept the contention of the prosecution that based on the judgment of Malik JC in *Nageswari's* case, a plea of guilty by an accused person who is presently fit to stand trial, but who may have been of unsound mind at the time of the commission of the offence, cannot be accepted and that a full trial ought to be conducted. As pointed out earlier, insanity as a defence to a charge is quite distinct to unsoundness of mind affecting a person to stand trial. In this regard, I agree with the views expressed by Stanley Yeo, in the article referred to earlier where he says:

> It should be noted that the procedure in the case of insanity at the time of trial and the procedure relating to insanity at the time of the commission of the offence are entirely separate matters leading to different consequences and these matters should not be confused together.

The mere fact that the court has cognizance of a medical report to indicate that at the time of the commission of the offence the accused was of unsound mind, is irrelevant at the stage when the accused is certified fit to stand trial and he chooses to plead guilty. In any case, for purposes of establishing insanity as a defence, the medical report by itself is insufficient. It should be emphasised that for purposes of s. 84 of the Penal Code, what needs to be established is legal insanity and not mere medical insanity. Besides establishing that the accused was of unsound mind at the time he committed the offence, he needs to go further to establish that either (a) he was incapable of knowing the nature of the act; or (b) that he was incapable of knowing what he was doing was wrong or contrary to law. As to some of the difficulties which arise in the application of s. 84, see the comprehensive article by Dr J K Canagarayar, Senior Lecturer at the Faculty of Law, National University of Singapore, entitled, *"The Plea of Insanity: Some Observations on the Application of the "Wrong or Contrary to Law" Test in Singapore, Malaysia and India",* [1995] 2 MLJ iii. I would also like to highlight the following observations made by the learned writer:

> In recent times the defence of insanity has been pleaded in Singapore, Malaysia and India as a last desperate measure to avoid the death penalty. *The likelihood of the defence being pleaded in situations where the accused is charged of having committed other offences such as theft or mischief (eg arson) is rather remote.* A defence counsel is not likely to plead that a common thief or arsonist be sent to a mental asylum instead of prison (at page ix). (Emphasis added)

Finally, I wish to re-emphasise two other points: (i) there is no express provision in the Penal Code or in the Criminal Procedure Code to state that a person who was of unsound mind at the time of the commission of the offence but who had subsequently recovered and had been certified fit to stand

trial, cannot plead guilty to the charge; and (ii) s. 347 of the Criminal Procedure Code is only applicable in cases where the accused had raised the defence of insanity under s. 84 of the Penal Code and the court has been satisfied that he has successfully discharged the burden placed upon him. In such cases, the court by invoking s. 347 of the Criminal Procedure Code, may order him to be sent to a mental home. Section 347 does not impose an obligation on the court to conduct a full trial whenever the court is aware of the previous mental condition of the accused. The question of insanity or unsoundness of mind of a person fit to stand trial can only arise if the defence of insanity is raised by the accused person himself.

Therefore to consider the antecedent incidence of unsound mind of the accused person at the time of the trial when the court is already satisfied that he is fit to stand trial is a wrong approach for the court to adopt. As pointed out earlier, insanity as a defence is quite different to insanity affecting the person to stand trial. An accused person has a right to invoke any of the exceptions stipulated in the Penal Code to acquire an acquittal. However, because the defence of insanity, if successful, unlike the position under the other exceptions, has other consequences, namely, the person being confined to a mental institution for an indefinite period of time, an accused may not wish to rely on this defence.

In a situation where a person has recovered from his medical impediments from the time of commission of the offence to the time when he is able to stand trial, the accused must, like any other accused person knowing the nature of the charge and the consequences of a trial, be at liberty to plead guilty or not. The mere fact that he was of unsound mind at the time of the commission of the offence, does not by itself take away from him this right to claim trial or not. So long as the court is satisfied that the accused understands the nature and consequence of the plea, his decision to make such a plea must be respected.

I may add, however, that as a matter of good practice, in cases where the court is aware that at the time of commission of the offence the accused was possibly of unsound mind, and though at the time of the trial he is fit to stand trial, the court ought to advise the accused that he may have a right to raise the defence of insanity under s. 84 of the Penal Code. After such advice is given and the nature of the defence of insanity explained to the accused, and the accused still maintains his plea of guilty, the court ought to accept the plea, and as such a full trial need not be conducted.

Postcript

In the course of writing this judgment, the recent case of *Maxwell v. R* [1996] 135 ALR 1, was reported. In that case, the High Court of Australia considered the question of law posed to it as to whether a trial judge, under the relevant laws applicable, had any power to reject a plea of guilty of an accused person. In that case, the appellant who was charged with murder pleaded guilty to the lesser offence of manslaughter on the basis of diminished responsibility under the Crimes Act 1900 (NSW).

The prosecutor then submitted to the trial judge that he should reject the accused's plea of guilty in the light of the further medical evidence "that the accused was not suffering from any significant danger of psychiatric disorder, sufficient to diminish his responsibility, for killing his wife". The trial judge then rejected the accused's plea.

In answering the question posed to it, the High Court held that a trial judge had the power to reject the plea, only if it was not a genuine plea; or to prevent an abuse of process; or if the interests of justice so required. In the course of their joint judgment, Dawson and McHugh JJ observed:

> An accused is entitled to plead guilty to an offence with which he is charged and, if he does so, the plea will constitute an admission of all the essential elements of the offence. Of course, if the trial judge forms the view that the evidence does not support the charge or that for any other reason the charge is not supportable, he should advise the accused to withdraw his plea and plead not guilty. But he cannot compel an accused to do so and, if the accused refuses, the plea must be considered final, subject only to the discretion of the judge to grant leave to change the plea to one of not guilty at any time before the matter is disposed of by sentence or otherwise.

They further added:

> The plea of guilty must, however, be unequivocal and not made in circumstances suggesting that it is not a true admission of guilt. Those circumstances include ignorance, fear, duress, mistake or even the desire to gain a technical advantage. The plea may be accompanied by a qualification indicating that the accused is unaware of its significance
>
> If it appears to the trial judge, for whatever reason, that a plea of guilty is not genuine, he or she must (and it is not a matter of discretion) obtain an unequivocal plea of guilty or direct that a plea of not guilty be entered. But otherwise an accused may insist upon pleading guilty.

In the instant case, the High Court held that the trial judge was wrong in rejecting the accused's plea of guilty. The court held that the trial judge did not have any discretion to reject the plea. Their Lordships observed (at p. 10)

> In sentencing the accused, (the trial judge) was required to proceed upon the basis that, in killing his wife, the accused's mental responsibility for his acts was substantially impaired by reason of abnormality of mind, notwithstanding any reservations which he may have entertained had the matter been one for his decision.

See also *R v. Starecki* [1960] VR 141, noted in [1960] MLJ lx.

Though the decision of the High Court in *R v. Maxwell* was based on the particlar statutory provisions applicable in New South Wales, yet certain of the observations made by the High Court support the view I have taken that there is nothing repugnant in an accused person, who was of unsound mind at the time of the commission of the offence, pleading guilty to the offence when he is subsequently certified to be fit to stand trial.

Reported by Michele Saw